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No. 87-5840

In The
Supreme Court of the United States
October Term, 1987

EDWARD McNAMARA,
Appellant,

v.

COUNTY OF SAN DIEGO
DEPARTMENT OF SOCIAL SERVICES,
Appellee.

**On Appeal From The Court of Appeal
Of The State Of California
Fourth Appellate District, Division 1**

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
MOTION OF AMICUS CURIAE TO DISMISS OR AFFIRM AND
BRIEF AMICUS FOR THE CHILD IN SUPPORT OF APPELLEE

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To the Honorable William H. Rehnquist, Chief Justice, and to the Honorable Justices of the Supreme Court of the United States of America.

IT IS RESPECTFULLY REQUESTED that the undersigned Christian R. Van Deusen, Inc., and the individual, be granted leave to file a brief amicus curiae in support of the child and Appellee. This application is based upon the following:

The applicant is licensed to practice before this Supreme Court.

The issues in this case involve the Due Process and Equal Protection rights of a child, her psychological/adoptive parents, the putative father and the biological mother, as well as the State of California's interest in preserving familial relationships. Applicant's practice consists exclusively of adoptions, foster parent adoptions, termination of parental rights, children's rights cases, and associated litigation and appeals.

The firm has cases in trial courts throughout the State of California as well as out of state that involve the issues currently on appeal in this case.

The firm has handled numerous appeals involving children's rights, foster and adoptive parents' rights. The following are published opinions in which the firm was involved:

Adoption of Jennie L. (1980) 111 Cal. App. 3d 422, 168 Cal Rptr. 695.

In re Baby Girl M. (1984) 37 Cal. 3d 65, 207 Cal. Rptr. 309, 688 P. 2d 918.

Michael U. v. Jamie B. (1985) 39 Cal. 3d 787, 218 Cal. Rptr. 39, 705 P. 2d 362.

Christina K. v. Superior Court (1986) 184 Cal. App. 3d 1463, 229 Cal. Rptr. 564.

Jinny N. v. Superior Court (1987) 195 Cal. App. 3d 967, 241 Cal. Rptr. 95.

Adoption of Alexander S. (Mar. 1988) 44 Cal. 3d 857, — Cal. Rptr. —, — P. 2d —.

In total, during the past twelve (12) months this firm has litigated approximately 25 adoption cases in which parental rights were at issue. An equal number were resolved by waiver or default.

The applicant was granted leave to file a brief amicus curiae before the Supreme Court of the State of California in the case of *In re Baby Girl M.*, 37 Cal. 3d 65 (1984), *the same case now before this Honorable Court.*

The firm was recently granted permission by the California Supreme Court to file briefs amicus curiae in case number SOO3804—foster parents' rights and termination of parental rights; and, case number SOO3755—foster parents' rights, children's rights and putative fathers' rights.

The firm also has cases before the 1st District Court of Appeals of the State of California (Humboldt County case numbers 24673 and 3216—termination of parental rights); The Third District Court of Appeals (case number C003203—rights of a putative father); The Fourth District Court of Appeals (case number G006435—termination of parental rights and writ of habeas corpus); The Second District Court of Appeals (case number B026622—termination of parental rights), all of which involve the constitutional issues before the court.

The firm represented Petitioners in the case of *Michael U. v. Jamie B.* (1985), 39 Cal. 3d 787, which case was decided by the Supreme Court of the State of California. This case involved the rights of a putative father and our State Supreme Court has, in that decision failed to address the constitutional rights of the psychological parents v. biological parents and the children involved. The same case was referred to extensively by the lower court given its similarity to this case.

The applicant has frequently been court appointed to represent the best interest of minor children.

The applicant has served five terms on the California State Bar Committee on Adoptions.

The applicant has testified before the California Select Committee on Youth and Children.

The applicant has lectured to the Annual Judges' Family Law Seminar of the California Center for Judicial Education and Research on the subject of Adoptions, Abandonment and Paternity Cases, and authored the Syllabus on those topics.

Because the nature of this applicant's practice and its interest in the issues on appeal, it is uniquely qualified to assist the court by presentation of an amicus curiae brief.

Appellant and Appellee have consented to the filing of the Amicus Curiae brief. Those letters of consent and any others will be filed with the Court forthwith. Letters requesting consent have been sent to all respective counsel.

Such brief is prepared and filed concurrently herewith.

Respectfully submitted,

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MOTION OF AMICUS CURIAE TO DISMISS OR AFFIRM

—o—

To the Honorable William H. Rehnquist, Chief Justice, and to the Honorable Justices of the Supreme Court of the United States of America.

Amicus Curiae herein adopts and incorporates by reference Appellee's Motion to Dismiss or Affirm and further urge the court to dismiss the appeal or, in the alternative, affirm the judgment of the Court of Appeal of the State of California, 4th Appellate District, Division 1.

—o—

OPINIONS BELOW

Amicus Curiae here incorporates by this reference the Statement of Opinions Below made by Appellee in Appellee's Motion To Dismiss or Affirm, filed herein.

———o———

RELEVANT STATUTORY PROVISIONS

Amicus Curiae here seeks to give some insight into the historical background of the statutory scheme and the judicial interpretations below. The evolution of the law reflects the public policy of the State of California and a shift towards focus on the needs of the child.

California has enacted the *Uniform Parentage Act* which sets forth the statutory scheme whereby non-marital fathers may assert their parental rights. In the case of a proposed adoption, the necessity of the putative father's consent will be judicially determined.

From the time of enactment, effective January 1976, appellate courts have applied varying standards in determining the necessity of a putative father's consent to adoption.

One line of cases applied the best interest of the child standard. *In re Marie R.,* (1978) 79 Cal. App. 3d 624, 145 Cal. Rptr. 122, *Cheryl H. v. Superior Court,* (1974) 41 Cal. App. 3d 27, 115 Cal. Rptr. 849, *W.E.J. v. Superior Court,* (1979) 100 Cal. App. 3d 303, 160 Cal. Rptr. 862. A divergent line of reasoning applied the double standard of detriment and best interest of the child as set out in California *Civil Code* § 4600.

On the facts before this court, in 1984 the California Supreme Court in *In re Baby Girl M.* (1984) 37 Cal. 3d 65, ruled that the necessity of a putative father's consent could not be dispensed with absent a showing that it would be *detrimental* to the child to place custody with him.

In 1985 the same court in a strongly divided 5-2 decision applied the detriment standard in *Michael U. v. Jamie B.,* (1985) 39 Cal. 3d 787. Three justices in the majority however strongly urged that *Baby Girl M.* be reversed and that the correct standard is the best interest of the child. (Concurring Kaus J., Mosk J. and Lucas J.).

Both *Baby Girl M.* and *Michael U.* pointed out that unfitness of the father need not be shown, and that detriment could result from the uprooting of the child.

The legislature resolved the issue by amending *Civil Code* § 7006 and § 7017, and effective January 1, 1987, the best interest standard became the exclusive test and the *Civil Code* § 4600 detriment finding no longer applied.

———o———

CONCLUSION

For the foregoing reasons, Amicus Curiae's Motion to Dismiss the appeal herein, or in the alternative to affirm the judgment of the State of California Court of Appeal, Fourth Appellate District, Division One should be granted.

Respectfully submitted,

CHRISTIAN R. VAN DEUSEN, INC.
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TED R. YOUMANS, Esq.
ROBERT R. WALMSLEY, Esq.

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BRIEF AMICUS CURIAE FOR THE CHILD IN SUPPORT OF APPELLEE

—o—

INTRODUCTION

The guarantee of Equal Protection ensures that no person or class of persons shall be denied the same protection of the laws which is enjoyed by others in like circumstances. *People v. Romo* (1975) 14 Cal. 3d 189, 196, 121 Cal. Rptr. 111, 534 P. 2d 1015. A sovereign may not subject men, women [and children] to disparate treatment where there is no substantial relationship between the classification and an important governmental purpose. *Reed v. Reed* (1971) 404 U.S. 71, 76, 30 L. Ed. 2d 225, 229, 92 S. Ct. 251; *Craig v. Boren* (1976) 429 U.S. 190, 197,

50 L. Ed. 2d 397, 407, 97 S. Ct. 451. In proceedings concerning termination of parental rights and contested adoptions, the courts are invariably confronted with several, and often inconsistent, interests.

One federal court has concisely identified these interests as follows: "the liberty and privacy interests afforded to the parents, the interests of the state, as parens patriae, in protecting children from harm, and finally, the often silent interests of the child. *Sims v. State Dept. of Public Welfare, etc.* (S.D. Tex. 1977) 438 F. Supp. 1179, 1191."

For the sound policies outlined herein courts must recognize the interest of the child. In the adoption arena, many scenarios can arise which throw the adoption into litigation. Those scenarios include: where a biological mother and her *husband* contest the adoption before the adoption is final; a biological mother contests the adoption, but the unmarried biological father ("putative father") does not contest and signs a waiver of his rights; the biological mother consents to the adoption but the putative father contests the adoption (as in the case at bar). These circumstances can be complicated depending on whether the adoption is an agency adoption (the parties work through the state) or a private adoption (the parties work through private attorneys with the state doing the investigation recommending or denying the adoption).

In all, these scenarios involve a high degree of emotion, including ambivalence by the biological parents at times, vengeance between the biological parents due to a love loss or other problems. While the parties and the courts straighten out these predicaments the child is going through his or her most crucial developmental period in his or her life, requiring the utmost of fidelity and care by the court to provide continuity, love and to aid the

child in building support, trust and strength. The child is the most innocent party.

There is no question the courts must also recognize the interests of everyone. Over the passage of time, however, the courts and legislature of the State of California have come to realize and now direct that of all parties involved, the child's interests are paramount. Amicus Curiae respectfully urges this court to send that message with vigor to the various states.

I

THE COURT MUST AFFIRM THE LOWER COURT'S JUDGMENT IN ORDER TO PROTECT THE PARTIES' RIGHTS TO EQUAL PROTECTION AND DUE PROCESS, ESPECIALLY THOSE OF THE CHILD'S

A. The Child Deserves The Fullest Protection By The Court

Between the child, biological mother, putative father, and adoptive parents, the child must be given the greatest rights and protection. The child is the most innocent and vulnerable party who stands to lose the most. A child's right to Equal Protection and Due Process under the United States and California Constitutions would be violated if the lower court were not affirmed.

Appellant is before this Court stating it is a denial of his right to Equal Protection to terminate his rights as a putative father *solely* on a finding it is in the best interest of the child. (Appellants' Jurisdictional Statement at pp. i and 8). Although the California Court of Appeals affirmed the trial court's judgment *which was based on severe detriment* to the child (see *In re Baby Girl M.* (1987) 191 Cal. App. 3d 786, at p. 790), even the required finding of detriment subjected the child, Katie, to a standard that invidiously discriminates against her. It violates Katie's right to Equal Protection to apply

a standard that says she cannot remain in a stable, loving, secure home that would be in her best interests because it cannot be shown that it would be *detrimental* to her to be placed with the putative father.

1. The lower court's decision, although applying the detriment standard, substantially protected the child's right to Equal Protection.

Any contention by Appellant that the public policy of the State of California is to apply a detriment or unfitness standard before terminating the rights of a putative father is fallacious and cannot be supported. In fact, justices of the same Supreme Court that issued the *In re Baby Girl M.* (1984) 37 Cal. 3d 65, 207 Cal. Rptr. 309, 688 P. 2d 918, decision (entitling a putative father to a preference under the terms of California *Civil Code* § 4600 and applying the "detriment" standard) strongly criticized themselves for applying the detriment instead of the "best interests of the child" standard. In their concurring opinions in *Michael U. v. Jamie B.* (1985) 39 Cal. 3d 787, 218 Cal. Rptr. 39, 705 P. 2d 362, they stated:

> "The more I think about it, the more certain I am that the trouble with this case is not so much the fact finding process, but the court's unfortunate misstep in *In re Baby Girl M.* . . . The sooner we rectify that mistake the better."

Id. at pp. 796-97 (Kaus, J. concurring).

> "While the majority managed to save this child by invoking a theory of abuse of trial court discretion, under these egregious circumstances that result is merely palliative. We should reconsider the *Baby Girl M.* decision before it does any more potential damage to the welfare of children and to the previously accepted orderly process of adoption. *We should return to the traditional rule: When there is an unmarried mother who proposes to place her child for adoption and a biological but not [marital,] father [objects,] the trial court should consider only the best interests of the child.*"

Id. at p. 797 (Mosk J., Lucas J. concurring). Emphasis added).

Moreover, the California legislature also responded to the Supreme Court's *Baby Girl M.* decision by amending the statute at issue today, California *Civil Code* § 7017. *Civil Code* § 7017(d)(2) now states, in pertinent part:

> "If . . . [a putative father] . . . claims parental rights, the court shall determine if he is the father. The court shall then determine if it is in the *best interest of the child* that [he] retain his parental rights or that adoption of the child be allowed to proceed. The court, in making that determination, may consider all relevant evidence. . . . If the court finds that it is in the *best interest of the child* that the father should be allowed to retain his parental right, it shall order that his consent is necessary for an adoption. If [the putative father] is not the father, or that . . . it is in the *child's best interest* that an adoption be allowed to proceed, [the court] shall order that [the putative father's] consent is not required for an adoption; such a finding terminates all parental rights and responsibilities with respect to the child. *Section 4600 [parental preference and detriment standard] does not apply to this proceeding.*" (Emphasis added).

By its language, the legislature specifically overruled *Baby Girl M.* by stating *Civil Code* § 4600 does ont apply. Therefore, although "detriment" was the law of this case below, it cannot be contended that California's policy was supportive of that standard.

Even if appellant's position warrants analyzing the lower court's decision in a "detriment vacuum" detriment may be found exclusively on the basis that it would be emotionally and psychologically harmful to uproot a child from a stable caring loving home of psychological parents whom the child only knows as parents. *In re Reyna* (1976)

55 Cal. App. 3d 288, 302, 126 Cal. Rptr. 138; *Michael U. v. Jamie B., supra*, 39 Cal. 3d at p. 795 and at fn. 7.

Other examples of California's policy to apply the best interests of the child standard are: the passage of *Civil Code* § 232.5 (requiring that in actions to terminate parental rights, the chapter shall be liberally construed to serve and protect the interests and welfare of the child); enactment of *Civil Code* § 232.6 (in actions to terminate parental rights this chapter is to serve the welfare and best interests of a child by providing the stability and security of an adoptive home); amendment to *Civil Code* § 7006 (requiring the court to consolidate a paternity action filed by a putative father with a 7017(d)(2) petition filed by adoptive parents, applying the best interests standard).

A poignant example of even a nationwide concern for recognizing a child's *equal* rights to those of their parents is in California's adoption of the *Uniform Parentage Act* (Civ. Code, § 7000 et seq., added by Stats. 1975, ch. 1244, § 11, pp. 3196-3204). In *Michelle W. v. Ronald W.*, (1985) 39 Cal. 3d 354, 216 Cal. Rptr. 748, 703 P.2d 88, the California Supreme Court states, in pertinent part:

> ". . . The act, approved in 1973 by the National Conference of Commissioners on Uniform State Laws (see Uniform Parentage Act, Comrs. Prefatory Note, 9A U.L.A. (Master Ed. 1979) pp. 579-582), "makes a revolutionary change in the law by abolishing the incidents of illegitimacy and *establishing legal equality of children without regard to the marital status of their parents.*" (6 Witkin, Summary of Cal. Law (8th ed., 1984 supp.) Parent and Child, § 242A, p. 326)."

Id. at 362,fn.5. (Emphasis added).

The *Uniform Parentage Act*, *Civil Code* §7002 assures equality where that section states:

> "The parent and child relationship extends *equally* to every child and to every parent, regardless of the marital status of the parents." (Emphasis added).

The detriment standard was correctly applied by the lower court and properly supported. Although "detriment" was the law of the case, the California courts and legislature do not support such a standard. In fact, Appellant was given a greater right, by application of that standard in the lower court than he would receive today. Public policy demands recognition of the child's best interests.

2. The lower court's decision substantially protected the child's right to Due Process.

The judgment from which Appellant appeals was issued in early 1987. At that time Katie was 5½ years old. On remand from the California Supreme Court, the trial court found that Katie would suffer extreme psychological and emotional harm if she were removed from the adoptive home. The Appellate Court's affirmance of that judgment protects her right to Due Process, recognizing her fundamental interests, and is amply supported by the several books, studies and research in the area of early childhood development.

The book, *Beyond the Best Interests of the Child*, has become a standard reference in this area of the law, being cited in *Michael U. v. Jamie B., supra*, 39 Cal. 3d at 787-795; *In re Angelia P.* (1981) 28 Cal. 3d at 908-917, 171 Cal. Rptr. 637, 623 P. 2d 198; *Adoption of Michelle T.* (1975) 44 Cal. App. 3d 699 at 706, 117 Cal. Rptr. 856; *Williams v. Neumann* (Ky. App. 1966) 405 S.W. 2d 556 at 557; and, *Michelle W. v. Ronald W., supra*, 39 Cal. 3d 354 at 363, which list is not inclusive. The authors distinguish between biological and psycological parents, stating:

> "[F]or the child, the physical realities of [her] conception and birth are not the direct cause of [her] emotional attachment. This attachment results from day-to-day attention to [her] needs for physical care, nourishment, comfort, affection and stimulation. Only a parent who provides for these needs will build a psychological relationship to the child on the basis of the biological one and will become [her] 'psychological' parent in whose care the child can feel valued and 'wanted'. An absent biological parent will remain or tend to become a stranger."

Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child* (1973) p. 17.

Further, the authors state:

> "Unlike adults, children have no psychological conception of relationship by blood-tie until quite late in their development. For the biological parents, the facts of having engendered, borne, and given birth to a child produce an understandable sense of preparedness for proprietorship and possessiveness. These considerations carry no weight with children who are emotionally unaware of events leading to their births."

Beyond the Best Interests of the Child (1973) p. 12.

The extent of personality and value structure development in children during the first six years of life is highly significant. (See generally e.g., *Developmental Psychological Today* (1971) ch. 13, pp. 225, 236.). "Attachment disorders" of infants are caused by "absence, disruption, or distortion of normally occurring development sequences of attachment behaviors that serve to orient and anchor the infant to [her] caretakers and provide for [her] a means by which to make an active adaptation to the wider social environment." (Kaplan, Freedman, and Sadock, *Comprehensive Textbook of Psychiatry/III, Volume 3, Third Edition*, p. 2587.

Trauma induced by separation in early childhood development leads to attachment disorders classified as:

> "primary attachment failure in early infancy," "attachment disorder of infancy, anaclitic type," and "attachment disorder of infancy, symbiotic type." These disorders include poverty of play, failure to progress in normal psycho social and intellectual development, regression in language and toileting functions, turning away from others, rocking, head banging, a predilection toward physical illness, accidents, self-injury, nutritional defects, excessive sleep, autonomatic instability, a weakening of the immunological system, and regressive behavior leading to deficiencies in adolescense and adulthood. (*Comprehensive Textbook of Psychiatry/III*, pp. 2589-2593).

If the Lower court removed Katie from her adoptive home, Katie would have suffered these anomolies. This action would have denied her Due Process. Surely, it would now devastate Katie to be removed from her psychological parents.

A child involuntarily separated from its mother or primary caretaker for either a brief or a prolonged interval demonstrates a fairly characteristic affective response, including an initial period of agitation and protest that is followed by despair. (Bowlby, J. *Childhood Mourning and Its Implications for Society* (1961) *American Journal of Psychiatry*, 118, 481-498). In fact, that loss has been found to lead to several immunological consequences and health implications. In an article by Laudenslager and Reite entitled *Losses and Separations—immunological Consequences And Health Implications*, the authors state "there is an extensive literature supporting the hypothesis that losses and separations are significant antecedents to increased mortality. Jacobs & Ostfeld, 1977; Kraus & Lilienfeld, 1959, and also indicating that major life stressors are associated with increased illness Rabkin & Struening, 1976; Rahe & Arthur, 1978. The health problems

range from the common cold to life-threatening cancer or even AIDS." Laudenslager and Reite (1984) *Losses and Separations—Immunological Consequences And Health Implications. Review of Personality and Social Psychology, vol. 5* P. Shaver (ed., pp. 285-290).

Lastly, in a compelling document prepared for ABC's Hour Magazine, entitled *High Risk . . . Children Without A Conscience,* Dr. Ken Magid and Carole A. McKelvey state "it is about babies, parenting, genetics and crime and how they are vitally connected." They go on to state:

> " . . . The answers start at the beginning of life, when the scales are tipped, either toward a future of trust and love, or mistrust and deep-seeded rage.
>
> The critical factor is bonding. Without correct bonding the infant will become unattached to his or her primary caretaker, the mother and/or father. A growing number of experts now believe that this stage in a baby's development has much greater significance than previously believed.
>
> . . .
>
> . . . A revolution is happening which may result in future generations of detached children. . . . The key to prevention is knowledge—a complete understanding of how healthy babies grow emotionally.
>
> The tragedy of unattachment will not go away. But violence does not have to be woven into the fabric of American life. It is our sincere desire that this book will shed light on why some individuals are anti social and what may be done to prevent damage to infants."

Id. at pp. i-ii.

The work draws a significant nexus between early childhood disruption of attachments and juvenile delinquency, crime, viciousness, unreliability, scattered work histories, sexual intercourse with numerous partners without becoming attached or intimate, persistent lying, failing to identify with spiritual thoughts, an obsession for control, no response to love and empathy, harboring resentments and devious natures. For these characteristics, Dr. Magid and McKelvey cite to Dr. Foster Kline, an authority on unattached children whose Institute for Human Behavior, located in Evergreen, California, has spent a lifetime diagnosing and treating children with attachment problems. (*Id.* at pp. 2-3).

There is strong authority by the California Supreme Court supporting recognition of the child's right to Due Process and the child's liberty interests in maintaining a safe, continuous, secure, loving and stable home. This court has similarly recognized the same. As recent as March 1988, California Supreme Court in *Adoption of Alexander S.* (1988) 44 Cal. 3d 857, — Cal. Rptr. —, — P. 2d —, stated "protracted litigation over the custody of a child may harm the child." (*Id.* at p. 868). The court went on to state:

> ". . . it is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether [she] is to remain in [her] current 'home', under the care of [her] parents or foster parents, especially when such uncertainty is prolonged."

Id. at p. 868. For the above proposition, the California Supreme Court cited this Court's decision in *Lehman v. Lycoming County Children's Services, supra* (1982) 458 U.S. 502, 513-14, 73 L.Ed.2d 928, 102 S.Ct. 3231.

In a strong concurring opinion issued February 10, 1988 by the Honorable Justice Brauer of the California Sixth Appellate District in *In re Micah S.* (1988) 198 Cal. App. 3d 557, 243 Cal. Rptr. 756, Justice Brauer states:

> ". . . And it is no longer open to question that the child's best interest must be paramount . . . . The legislature's awareness of the harmful effect of delay is patent . . .

> But it is clear that the balancing process which inheres in any Due Process analysis, the pendulum must swing further away from preoccupation with parents' rights and toward the protection of the waifs. It cannot be doubted that the legislature's well-meaning pronouncements in favor of the child's best interests and speedy adjudication have been palliatives at best. . . . I have no doubt that the most serious bottleneck is the appeal, and that the plight of children in limbo cannot be ameliorated unless means are found to discourage the taking of appeals. . . . [S]omething must be done to afford these small human beings some change for growth and a glimmer of future happiness."

In re Micah S., supra, 198 Cal. App. 3d at pp. 564-568.

B. The State Has A Substantial Interest In Upholding The Integrity of A Familial Relationship.

In *Lehman v. Lycoming County Children's Services, supra*, 458 U.S. 502 at 513, this court stated "[t]he State's interest in finality is unusually strong in child-custody disputes."

In *Quilloin v. Walcott* (1977) 434 U.S. 246, 54 L. Ed. 2d 511, 98 S. Ct. 549, this court stated:

> "Rather the result of the adoption in this case was to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the 'best interests of the child.'"

Id. at p. 255 (quoting from *Smith v. Organization of Foster Families For Equality and Reform* (1976) 431 U.S. 816 at p. 683, concurring opinion by Stewart, J.)

The integrity of the familial relationship is strongly recognized in California. In *Michelle W. v. Ronald W., supra*, 39 Cal. 3d 354, the California Supreme Court stated:

> "We turn to the interests of the state. . . . including certain social policies upholding the integrity of the family (*Kusior v. Silver* (1960) 54 Cal. 2d 603, . . ., and protecting the child's welfare (*In re Lisa R., supra*, 13 Cal. 3d at pp. 649-650). . . . The interests noted above apply to the facts of the case at bench. Here, [the Putative father's] private interests in establishing a biological relationship in a court of law is overridden by the substantial state interests in familial stability and the welfare of the child."

Id. at pp. 362-363. In other words, the private interest yielded to the state's interest.

The court in *Kusior, supra*, stated, "There are significant reasons why the integrity of the family when husband and wife are living together as such should not be impugned." *Kusior v. Silver, supra*, 54 Cal. 2d at p. 619. Although Appellant is not a marital father in the case at bar, the *Kusior* court simply states that where a familial relationship exists the state has a significant interest in sustaining it. The lower court here found a "familial relationship" as existing between the adoptive/psychological parents and the child, Katie. Given the fact Appellant brings this appeal clearly after that relationship nurtured and formed, Amicus Curiae respectfully urges this Court find the state's interest in protecting that family outweighs the private interest of Appellant.

Further the California Supreme Court stated in *In re Angelia P.* (1981) 28 Cal. 3d 908, 171 Cal. Rptr. 673, 623 P. 2d 198:

> "We have recently acknowledged that 'Parenting is a fundamental right, and accordingly, is disturbed only in extreme cases of persons acting in a fashion incompatible to parenthood.' . . . Nonetheless, parental rights are not absolute and we must seek a consistent and reasonable approach to the varying rights involved when the state, by intervention, disturbs natural familial relationship."

Id. at p. 916.

The courts have most recently recognized the significant interest of the state in upholding the integrity of the family in *John Roe v. Superior Court of the State of California, County of Marin,* (1988) 88 Daily Journal D.A.R. 8049 and in *Michael H. v. Gerald D.* (1987) 191 Cal. App. 3d 995, 236 Cal. Rptr. 810.[1]

C. The Father's Statutory And Constitutionally Recognized Rights Were Protected.

The Equal Protection Clause of the United States Constitution does not mandate that all biological fathers be afforded the equivalent rights of the biological mother or child. The mere existence of a biological link does not merit equivalent protection. *Lehr v. Robertson* (1983) 463 U.S. 248, 266, 77 L. Ed. 2d 614, 103 S. Ct. 2985. There are certain fathers, generally distinguished by statute, which, due to their conduct and expressions, are elevated to a level whereby their rights are equal to that of a natural mother. *Caban v. Mohammed* (1979) 441 U.S. 380, 392, 393. California has enacted statutory provisions stating marital fathers are afforded equivalent protections as a mother—referring to them as "presumed fathers." (California *Civil Code* § 197 and § 7004). Biological fathers not embraced within the statutory provisions of California *Civil Code* § 7004 are referred to as "putative fathers." Their rights are set forth within the statutory provisions of California *Civil Code* § 7017(d).

A putative father falling within the ambit of 7017(d) is entitled to notice of any adoption proceeding and a right to be heard if he objects. (California *Civil Code* § 7017(d) and (f).) During the proceedings below the court was re-

[1] Amicus Curiae notes in *Roe v. Superior Court of the State of California, County of Marin,* fn. 2 that the United States Supreme Court granted review of *Michael H. v. Gerald D.* on February 20, 1988.

quired to find that it was/was not detrimental[2] to the child to remove her from her adoptive home and placed with the biological father. Such statutory requirements substantially protected the biological father's rights to Due Process and Equal Protection while, most importantly, protecting the child's best interests.

1. The rights afforded Appellant as a putative father, comport with the United States Constitution and decisions of this Court.

In *Stanley v. Illinois* (1972) 405 U.S. 45, 31 L. Ed. 2d 551, 92 S. Ct. 1208, the father and mother had never married, but had lived together intermittently, and he had held out the children as his own, making him a presumed/legitimate father with a familial relationship. After the mother's death, the state took the children into their custody. This court held that due process and equal protection required that a state give notice to a natural father and provide a hearing on his fitness before the children could be taken from his care and custody. The California law at the time of this action met that requirement. In a proceeding to terminate parental control, a citation must be served on the parents and they are entitled to appear, at the states expense, with court appointed counsel. California *Civil Code* § 235, 237.5.

In *Quilloin v. Walcott* (1978) 434 U.S. 246, 54 L. Ed. 2d 511, 98 S. Ct. 549, the child was born to a couple which had never been married nor had ever established a home together. The mother subsequently married the adopting petitioner, Walcott, who petitioned to adopt the child with the mother's consent. The trial court overruled the father's objection to the adoption based upon the Georgia

[2] Amicus Curiae notes while the detriment standard was applicable during the proceedings below, *In re Baby Girl, M,* 37 Cal. 3d 65, such standard is no longer applicable, (California *Civil Code* Section 7017(d)(2)).

statute which denied the unwed father power to veto the adoption. This court held the Georgia statute was constitutional as applied.

Quilloin sets forth the principle that a father whose relationship to the child is only biological may be treated differently from a father who has established a family relationship with the child and mother. This principle was reiterated by this court in *Parham v. Hughes* (1979) 441 U.S. 347, 60 L. Ed. 2d 269, 99 S. Ct. 174, wherein this court again upheld a statute denying a father's illegitimate children the right to recover damages for the wrongful death of the children, although such recovery was allowed to all fathers who legitimated their children and all mothers.

In contrast this court struck down a gender based statute in *Caban v. Mohammed* (1979) 441 U.S. 380, 60 L. Ed. 2d 297, 99 S. Ct. 1760. In *Caban* the unmarried parents *had lived together for five years as husband and wife* and during this period two children were born, obviously making the father a presumed/legitimate father who had firmly established a familial relationship. The parents subsequently separated and the mother married the adopting petitioner, Mohammed. Mohammed thereafter sought to adopt the children with only the mother's consent. The father, Caban, had also remarried. He and his new wife also filed a petition for adoption. The applicable New York law set forth that an unwed mother could veto an adoption, but an unwed father could not. Based upon this statute, the trial court granted the adoption petition of the Mohammeds. This court reversed on the ground that the gender based distinction in the state law was unconstitutional. This court found that the New York statute created an overbroad gender-based discrimination between all unmarried fathers and all unmarried mothers.

Caban illustrated the injustice created by the statute in discriminating between parents who had lived as a family for years. However, under California law, *Caban* would have been classified as a presumed father, thus entitled to veto any proposed adoption under California *Civil Code* Sections 224 and 7017(d).

The California statute, 7017(d), avoids the fault of discriminating between all unwed mothers and all unwed fathers.

> "The statutory classification sets apart those biological fathers who have neither gone through an apparently valid marriage ceremony with the mother nor lived with the child as a parent."

W.E.J. v. Superior Court (1979) 100 Cal. App. 3d 303, 314, 160 Cal. Rptr. 862. As further recognized in *W.E.J.*:

> "Those biological fathers who were denied the veto power are easily distinguishable from those who hold the power. Members of this class have neither expressed the interest which is implied in the marriage ceremony nor undertaken the care of the child in the common home. The legislature was not unreasonable in concluding that that class will contain a substantial portion of fathers who are strangers to the child and whose objection to adoption will be based upon something other than a mature consideration of the child's best interests. *The protection of the child is well recognized as an important state interest.*
>
> To the extent that this classification is based upon gender, it is based upon an actual difference in situation. Whatever else may be said of an unwed mother, she is no stranger to her child. A gender-based classification is not improper where a man and woman are not similarly situated. (See *Schlesinger v. Ballard*, 419 U.S. 498 [42 L. Ed. 2d 610, 95 Supreme Court 572])." *Id.* at 314-315. [emphasis added].

Each of the authorities cited serve to illustrate the important principle that both the state and the child's interest serve a substantial interest in distinguishing be-

tween a presumed father and a putative father. (See *Lehr v. Robertson*, 463 U.S. at 265-267; *Quilloin v. Walcott*, 434 U.S. at 252; *W.E.J. v. Superior Court*, 100 Cal. App. at 315). Certainly states could enact statutes entitling all fathers, presumed or putative, to equivalent rights. Such rights due to constitutional mandate would include the power to veto an adoption. *Caban v. Mohammed, supra*, 441 U.S. at 389. However, such a statutory scheme would not ensure promptness, finality, and promotion of the child's best interest and would be contrary to this court's stated policy. (*Lehr v. Robertson*, 463 U.S. at 265). For these reasons, this Court has recognized the states' ability to distinguish between a presumed father and a putative father. *Id.* at 267.

This does not mean that a putative father is without rights. Under this Court's decisions, in *Stanley v. Illinois*, 405 U.S. 645 (1972), *Quilloin v. Walcott*, 434 U.S. 246, 1977), and *Lehr v. Robertson*, 463 U.S. 248 (1982) and under the then applicable California statute governing the rights of the putative father, California *Civil Code* § 7017 (d), a putative father is entitled to notice of any and all proceedings concerning legal custody of the child, is entitled to the right to be heard and is entitled to a determination of whether or whether not it would be detrimental to the child to uproot it from its present care and custody as well as what is in the ultimate best interest of the child.

In the present matter, it is clear Appellant is not a presumed father. His rights, therefore, are governed by the statutory provisions of California *Civil Code* § 7017(d). As noted above, § 7017(d) mandates that a putative father be given notice of any proceedings concerning legal custody of the child and provided the right to be heard. Further, a putative father is entitled to proffer evidence

as to why it would be in the child's best interest that custody be with him and/or why it would not be detrimental to the child to change the existing custody arrangements. Appellant was afforded each of the procedural requirements under § 7017(d) and indeed had the opportunity to offer evidence as to the child's best interest and/or any detriment, if any, that may or may not befall this child due to a change in custody. Thus, Appellant's rights under both the Due Process Clause and the Equal Protection Clause have not been violated.

2. A finding of detriment did not require a finding of parental unfitness.

Appellant contends that it was a violation of his right to Equal Protection to terminate his parental rights without a finding he was unfit. (Appellant's jurisdictional statement at pp. 1 and 8). Such a proposition is untenable given this Court's recognition that the child's interests are paramount. *Lehr v. Robertson, supra*, 463 U.S. at 257.

Appellant's proposition, worded another way, would require a finding of parental unfitness, before terminating parental rights, despite a finding the child will incur and suffer devastating detrimental effects due to a change in custody. This proposition virtually ignores any and all rights a child has to be free of the harm caused by uprooting it from a bonded, secure environment. (See *supra*). As pointed out by the California Supreme Court in *In re Angelia P., supra*, 28 Cal. 3d 908:

> "More recently, the primacy of another consideration has evolved in the reasoning of courts, legislatures, and commentators which have focused on the child's well-being, seeking to ascertain the 'best interest' of 'the least detrimental alternative to the child.' Our legislature's concern is manifest in its direction threat

the statutes concerning the termination of parental rights shall be liberally construed to serve and protect the interest and welfare of the child. (Section 232.5: See also Welfare and Institutions Code, subsection 302, 319.5, 328.5, 360-370: Senate Bill number 1726 (Presley 1980) [Statutes establishing and regulating "demonstration" counties involved in innovative approaches to dealing with removal, termination, and foster care for children].)

In theory, the evolving "Parental preference" and "child's best interest" standards do not necessarily conflict. As one commentator has noted 'In general, children's' needs are best met by helping parents achieve their interests. In some situations, however, there may be a conflict of interest . . . in these situations, the legal system should protect the child's interests. Not only is the child a helpless party, but the parents should suffer the consequences of their inadequacy rather than the child.'"

Id. at 916, 917.

Detriment is a term of art involving numerous factors. But this court must keep in mind that the issue is "detriment to the child." Certainly a parent's unfitness is a factor to be considered. However, it need not be found before even a biological mother or presumed father's rights can be terminated. *In re B.G.* (1974) 11 Cal. 3d 679, 694, 695, 144 Cal. Rptr. 444, 523 P. 2d 244. The central focus, while considering parental rights, is that of the child. *In re Angelia P., supra,* 28 Cal. 3d at 917.

Indeed, parental unfitness was expressly found not to be required in a determination of detriment pursuant to proceedings to terminate parental rights. *In re B.G., supra,* 11 Cal. 3d at 697. The *B.G.* court stated:

> "In summary, the parental preference doctrine, as it existed before the enactment of the Family Law Act, embodied both the requirement that a custody order in favor of a non-parent rest upon a finding of parental unfitness, and the limitation that such an order would be made only in extreme cases. The enactment of Section 4600 changes the former principle, and focuses the attention not on the unfitness of the parent, but the detriment to the child. See *Guardianship of Marino,* (1973) 30 Cal. App. 3d 952, 958.)"

Id. at 698. The Court continued, citing the 1966 report of the Governor's Commission on the Family:

> "Explaining this refusal to require that such custody awards rest upon the finding of parental unfitness, the Commission stated that 'We have no intentions of undermining the parents rights to the custody of their children, and we believe that the primacy of those rights must be preserved. We are convinced, however, that no useful purpose can be served by forcing a formalized finding of unfitness. The cases in which a child's best interest will require a custodial award to a third person may be rare, but are nonetheless serious. To take the most common example, if the custodial parent dies and the Court should specifically find that the child's welfare would be best served by awarding custody to the stepparent, with whom the child has been living and with whom he has formed a warm and stable relationship, should not the court be so able to order without having to find a long-absent or minimally-interested parent judicially unfit? We believe that it should.'"

Id. at 697.

Appellant has correctly pointed out that this court elected not to address the issue of whether the state is constitutionally barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit. (Appellant's Jurisdictional Statement at p. 8). *Caban v. Mohammed,* (1979) 341 U.S. 380, 394 n. 16. Yet, as set forth above, such a finding of parental unfitness is not a prerequisite to terminating parental rights. A requirement of parental unfitness would effectively ignore the paramount rights of the child.

However, with regard to a putative father, this court has decided the issue of whether unfitness is a requirement before his parental rights can be terminated. In *Quilloin v. Walcott, supra,* 434 U.S. at p. 255, this court found that unfitness of a putative father need not be found before his parental rights could be terminated. In *Quilloin,* the biological father appealed the decision of the Supreme Court of Georgia terminating his parental rights. The biological father argued that he was entitled, as a matter of Due Process and Equal Protection, to an absolute veto over adoption of his child, absent a finding of his unfitness as a parent. This court noted, in affirming the Supreme Court of Georgia:

> "We have little doubt that the due process clause would be offended '[I]f a state were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the child's best interest.'" *Smith v. Organization of Foster Families,* 431 U.S. 816, 862 -863 (1977). (Stewart, J. concurring in judgment.) "But this is not a case in which the unwed father at any time, had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never lived before. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned except appellant. *Whatever might be required in other situations, we cannot say that the state was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the 'best interest of the child.'"* [Emphasis added]

Id. at 255.

In the matter at bar, it is clear Appellant is not a presumed father and is not entitled to the entire assemblage of parental rights that a mother ordinarily is afforded. Pursuant to statutory definition, Appellant's status is that of a putative father. His rights are governed by *California Civil Code* § 7017 (d). As such, the court was not compelled, pursuant to the United States Constitution, the decision of this court and applicable California statutes and case law, to make a finding that he was unfit before his parental rights could be terminated. Therefore, the lower court's decision was entirely correct.

D. The Lower Court's Decision Protected The Rights Of The Mother While Also Protecting The Child's Best Interest.

Pursuant to California *Civil Code* § 197, the mother of a child has the exclusive right to custody, unless there is a presumed father. (Formally, legitimation). As discussed *supra,* Appellant herein is a putative father; social policy says his rights are less than a presumed father.

The question presented before the California courts on numerous occasions is whether a mother can prevent the father from becoming a presumed father. The courts have responded with a resounding yes. In *Adoption of Marie R.* (1978) 79 Cal. App. 3d 624, 145 Cal. Rptr. 122, the court stated:

> "Charles here relies on the fact that he has tried to have the child with him in his mother's home but has been frustrated in those attempts by the refusal of the mother to permit him to have the child. That is not sufficient. The cases have recognized that a mother may, by her conduct, prevent a natural father from securing even the minimal contact with a child that the old section required. (*Adoption of Rebecca B.* (1977) 68 Cal. App. 3d 193, 198 [137 Cal. Rptr. 100]; *In re Reyna* (1976) 55 Cal. App. 3d 298, 300 [126 Cal. Rptr. 138].)"

Id. at 603.

For twenty years prior to the decisions in *Marie R.* and *W.E.J. v. Superior Court,* (1979) 100 Cal. App. 3d.

303, 160 Cal. Rptr. 862, the courts have refused to hold that a putative father could legitimate the child against the will of the mother. *Adoption of Irby* (1964) 226 Cal. App. 2d 238; *Adoption of Pierce* (1971) 15 Cal. App. 3d 244; *Truschke v. LaRocca* (1965) 237 Cal. App. 2d 75; *Cheryl H. v. Superior Court* (1974) 41 Cal. App. 3d 273, 277-278; *Guardianship of Smith* (1954) 42 Cal. 2d 91, 98.

Further, the mother does not waive the right to prevent the father from becoming a presumed father by placing the child for adoption:

> "The application of the New Parentage Act classification was before this court in *Adoption of Marie R.* (1978) 79 Cal. App. 3d 64 [145 Cal. Rptr. 122]. That case, as here, the mother had turned over her nonmarital infant to a couple who desired to adopt. A man claiming to be the biological father offered to receive the infant into his home and to provide support, but the mother refused the offer. The father objected to the adoption and contended that, since he had done everything he could do to provide a home for the child, this tender was enough to give him the status of "presumed father", and to exercise the veto which the code gives to a man who is so classified. The trial court accepted that theory and made an order that the adoption not proceed because of the objection of the father. That order was reversed because the father had no veto power. We also considered and upheld the constitutionality of the classification, citing *Quilloin v. Walcott* (1978) 434 U.S. 246 [54 Lawyers Edition 2d 511, 98 Supreme Court 549]. In so deciding we recognized that, with respect to a nonmarital child, the mother may, by her conduct, prevent the male from acquiring the status of "presumed father" which would have given him a veto over adoption. [27 Cal. App. 3d at page 630]"

W.E.J. v. Superior Court, supra, 100 Cal. App. 3d 303 at 310:

The court noted Justice Traynor's comment in *Adoption of Irby,* (1964) 226 Cal. App. 2d 238; 37 Cal. Rptr. 379:

> "This case recognizes that there are two situations in which the father of an illegitimate child cannot legitimate the child even though he is willing to do so. The first situation is where his wife, who is not the mother of the child, refuses to permit him to receive the child into the family circle, and the second is where the natural mother of the child refuses to give up custody of the child thereby preventing him from receiving the child. If either of these consents is lacking, he may not legitimate the child."

Id. at 240.

In *Cheryl H. v. Superior Court* (1974) 41 Cal. App. 3d 273, the court stated:

> "The mother may effectively preclude legitimation where, as here, she refuses to marry the father or relinquish custody of the child to him."

Id. at pp. 277-78.

This court has also found that a state statute which always required the mother's consent to an adoption of the child born out of wedlock, but required the fathers consent *only* if he had legitimated the child, did not violate the equal protection clause. *Lehr v. Robertson, supra,* 463 U.S. at 267. This court also recognized that States may enact legislation which guarantees to certain people the right to veto an adoption and the right to prior notice of any adoption proceeding. *Id.* at 266. The mother of an illegitimate child is always within the favorite class, but only certain putative fathers are included. *Id.* at 266.

The crux of the issue comes down to whether a mother should be precluded from taking steps to actively promote the best interest of the child when an illegitimate father is in existence. The answer should be no.

More often than not, the scenario presented is that a mother has been impregnated by a male and then never hears, or rarely hears, from that person after the damage

is done. The mother never receives maternity or emotional support needed during the troubled period of pregnancy. During and after birth, the mother, recognizing that she is both financially and perhaps emotionally incapable of caring for the child, elects to provide for the child's welfare by placing it in an adoptive home. Often upon learning of the adoption the biological father does nothing. Occasionally however, the biological father will react in the form of protesting the adoption. When this occurs, the mother will invariably opt to fight him for custody. The mother's reaction is due to her having already made a decision as to best interest of the child, i.e., adoption.

The Salient issue is whether the courts must recognize the rights of the mother to act on behalf of the child and avoid "strapping" herself to a perhaps unwanted child rearing or continued relationship with the putative father. In order to prevent this catch-22, the courts must protect the mother's right to place the child for adoption. If the putative father contests, the appropriate time and place for that contest is at a *Civil Code* § 7017 hearing where at the rights of all parties will be preserved, including the adoptive parents' and childs'.

E. Affirmation Of The Lower Court's Judgment Preserves The Adoptive Parent's Rights To Equal Protection And Due Process.

In many ways the state's interest in promoting adoption and the child's right to maintain a safe, continuous, loving home intertwine with the rights of the adoptive parents. The Honorable Justice Stevens' dissenting opinion in *Caban v. Mohammed, supra*, 441 U.S. 380, states: "the interest in facilitating adoption in appropriate cases is strong—perhaps even "'compelling'". *Id.* at p. 402. This interest is codified in California at *Civil Code* § 232.6, *supra*, where it states "the purpose of this chapter is to serve

the welfare and best interest of a child by providing the stability and security of an adoptive home when those conditions are otherwise missing".

The rights of non-biological, or "psychological parents" received clear constitutional protection in 1973. In *C.V.C. v. Superior Court*, (1973) 29 Cal. App. 3d 909, 106 Cal. Rptr. 123, the court heard an adoptive couples' appeal when their child was removed without a hearing by the agency, one year after being placed with them. The court then held that:

> "the Fourteenth Amendments' guarantee of due process of law requires notice and opportunity to be heard before an individual suffers governmental deprivation of a fundamental interest . . . In determining whether a status or right is fundamental, the courts consider its effect in human terms and its importance to the individuals' life situation. (*Bixby v. Pierno* (1971) 4 Cal. 3d 130, 144 [93 Cal. Rptr. 234, 481 P. 2d 242].)
>
> Gain of a child for adoption fulfills the prospective parents' most cherished hopes. The event marks the onset of a close and meaningful relationship. The emotional investment does not await the ultimate decree of adoption. Love and mutual dependence set in ahead of official cachets, administrative or judicial. The placement initiates the closest conceivable counterpart of the relationship of parent and child.' (*Adoption of Barnett* (1960) 54 Cal. 2d 370, 377). To characterize enforced removal of the child as a 'grievous loss' is to state the obvious."

C.V.C. v. Superior Court, supra, 29 Cal. App. 3d at p. 916.

Although the notion that "blood is thicker than water" is still prevalent, Justice Friedman in footnote 7 makes this revealing observation:

> Is [biological parenthood] more natural or more important than the mutual, reciprocal and continuous

relationship between parent and child, which may occur in adoptive or non-adoptive families, involved in the rearing of a child from infancy to maturity with all of the impact of day-to-day care and upbringing upon character, psychology, outlook, emotional make-up, and even biology which that entails? In this sense, does not nurture 'do the work of nature' and create one a child who by nature is a stranger? In fact, in this sense, does not nature do the work of nature and create one a child who by nature is not a stranger? (TenBrock, *California's Adoption Law and Programs* 6 Hastings L.J. 261, 276 (1955).

Once the standards of constitutional protection are brought into play, the parties must be treated equally. Indeed, to impose upon one type of parent a stricter standard or heavier burden of proof violates the 14th Amendment. Appellant is asking this court to impose a burden on the adoptive parents and child to prove that it would be detrimental to the child if the child were placed in his custody. Such burden is not applied to him and therefore a patent inequality exists. This theme of equality has existed for many years in California. In *Adoption of Barnett* (1960) 54 Cal. 2d 370, 6 Cal. Rptr. 562, 354 P. 2d 18, the California Supreme Court held:

> The rule of strict construction of our adoption statutes in favor of the natural parents . . ., [is] inconsistent with the decisions of this court . . ., as well as with *Civil Code Section* 4, [and therefore] is disapproved.

Id. at p. 378.

The courts have strengthened their view recently. The court in *Adoption of Duckett* (1975) 48 Cal. App. 3d 244, 121 Cal. Rptr. 574, citing *San Diego County Department of Public Welfare v. Superior Court* (1972) 7 Cal. 3d 1, 101 Cal. Rptr. 541, 496 P. 2d 453, stated that:

> The requirement of consent by a natural parent is not strictly construed in favor of the rights of the natural parent, but *instead is liberally construed in order to effect the objection of the adoption statute in promoting the welfare of the children.*" (Emphasis added)

Adoption of Duckett (1975) 48 Cal. App. 3d at p. 248.

Surely, given the time, emotion, love and perseverance the adoptive parents have demonstrated they cannot be denied recognition of a substantial right both in the outcome of this litigation and to maintain a continuous relationship with the child, Katie, who knows only them as her parents.

Further, to decide the future of a child, and the custodial placement in which the child will be forced to live, without consideration of the child's best interest, is a violation of Due Process and Equal Protection.

State intervention into enumerated or implied rights in the United States Constitution has been held to trigger a strict scrutiny of the statutes involved to insure that they do not violate the Equal Protection Clause of the Fourteenth Amendment. *Shelly v. Kramer*, (1948) 334 U.S. 1; *Griswold v. Connecticut*, (1965) 381 U.S. 479. For this reason, courts must be prohibited from lightly disregarding the rights of the adoptive parents and the child.

CONCLUSION

This case, as decided by the lower court, represents the changing trend recognizing the child's interests. It effectly denounces the archaic notion that children are mere chattel for which biological parents hold the deed. Children are people too. They also have fundamental interests and due to their vulnerability, their interest must be afforded the greatest protection. The lower court indeed

recognized this and ruled accordingly. For this reason and the foregoing Amicus Curiae strongly urges this court to affirm the decision of the lower court.

DATED: July 5, 1988

Respectfully submitted,

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